**From:** Brian Allbee
**To:** Microsoft ATR
**Date:** 1/25/02 11:07am
**Subject:** Microsoft Settlement

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To Whom It May Concern:

With the deadline for public response to the proposed Final Judgement against Microsoft upon us, I've run out
of time to make this as coherent as I would like, so some of this may be little more than citation of web-
pages or other media that make some of the points I am concerned with.

These problems lead me to conclude that the Proposed Final Judgment, as written, allows (sometimes encourages)
significant anticompetitive practices to continue. I do not believe that the Proposed Final Judgment (as it
stands now) is in the public interest, or that it should be adopted without addressing various issues:

Revised Proposed Final Judgement

III.A.2: (Microsoft shall not retaliate against an OEM ... because it is known to Microsoft that the OEM is or
is contemplating) shipping a Personal Computer that (a) includes both a Windows Operating System Product and a
non-Microsoft Operating System, or (b) will boot with more than one Operating System.

What about machines that do not boot with ANY Microsoft OS? A VERY cursory count of alternative operating
systems that are available for Intel-compatible PCs yields 18+ alternatives (see http://dir.yahoo.com/Computers_and_Internet/Software/Operating_Systems/), NOT including all the various
different distributions of Linux (20+ different alternatives as a bare minimum) and varieties of Unix (6+
alternatives, at least). Is this remedy supposed to allow the companies that produce these "alternative
operating systems" to compete on a fair basis with Microsoft? One of these alternatives has already
essentially died (BeOS), and I strongly suspect that a good part of the reason it did was because it COULD NOT
compete with Microsoft's on a fair basis, despite it being (in my opinion) technically superior software.

III.C: (Microsoft shall not restrict by agreement any OEM licensee from exercising any of the following
options or alternatives) [items paraphrased]:
  1. Installing Non-Microsoft middleware/applications;
  2. Distributing/promoting non-Microsoft middleware/applications within the Windows OS;
  3. Auto-launching any non-Microsoft middleware/application(s) upon completion of the Windows boot-process;
  4. Allowing third-party boot-loaders to launch a second OS (presumably installed by the OEM);
  5. Allowing pre-boot promotion of its own IAP offer;
  6. Exercising any of the options under section III.H (summarized below)

III.H: (Starting at the earlier of the release of Service Pack 1 for Windows XP or 12 months after the
submission of this Final Judgment to the Court, Microsoft shall) [items paraphrased]:
  1. Provide easy removal of Microsoft middleware/applications to users and OEMs;
  2. Provide easy means to users and OEMs to allow non-Microsoft middleware/application configuration as
defaults for various file/document types;
  3. Make certain that no Microsoft product makes alterations to any OEM-configured defaults without alerting
the end-user that such alterations are being made (and presumably what effects they will have);

Again, I note no explicit language prohibiting Microsoft from acting against OEMs that provide non-Microsoft
OS system-options (though III.C.4 is a step in the right direction). None of these

points makes more than a
token effort to allow aconsumer (through the OEM) to CHOOSE whether they want a Microsoft OS or something else
entirely/exclusively (including no OS whatsoever from the OEM). If the core of Microsoft's monopoly is the
Windows OS (and derivatives thereof), then it seems logical that any final judgement must make some effort to
address the potential consumer desire to NOT have Windows on their PC. To do otherwise is to take NO action
towards allowing fair competition between the various OS options available.

Even simply guaranteeing an end-user the right to return an undesired/unused MS/Windows installation disk for
a full refund from Microsoft would be better than nothing - If an end-user has no reasonable choice but to
purchased a new PC from an OEM with Windows pre-installed, and they have no use for (or desire to use) that
OS, they should be free to remove it from the machine without having to shoulder the burden of a non-
returnable Windows disk. Frankly, even if they use Windows initially to retrieve an alternative OS from the
Internet, so long as they are not using it when the new OS is installed, they should be allowed to return it
(providing, of course, that they REALLY aren't using it again), in my opinion. It's not _that_ different from
taking a car for a test-drive, and seeing another car at another dealer during that test-drive, in my opinion.

There seem to be no provisions to prohibit Microsoft from holding back application and/or protocol information
that are required to be available to for-profit third-party competitive concerns from not-for-profit concerns
(i.e., Open Source projects, which inarguably compete with Microsoft). From http://www.pbs.org/cringely/pulpit/pulpit20011206.html:

"Well, Microsoft now appears to be exacting its revenge, leaning this time on the same letter of the old law
to not only get a better deal, but literally to disenfranchise many of the people and organizations who feel
they have been damaged by Microsoft's actions. If this deal goes through as it is written, Microsoft will
emerge from the case not just unscathed, but stronger than before.

Here is what I mean. The remedies in the Proposed Final Judgement specifically protect companies in commerce -
- organizations in business for profit. On the surface, that makes sense because Microsoft was found guilty of
monopolistic activities against "competing" commercial software vendors like Netscape, and other commercial
vendors -- computer vendors like Compaq, for example. The Department of Justice is used to working in this
kind of economic world, and has done a fair job of crafting a remedy that will rein in Microsoft without
causing undue harm to the rest of the commercial portion of the industry. But Microsoft's greatest single
threat on the operating system front comes from Linux -- a non-commercial product -- and it faces a growing
threat on the applications front from Open Source and freeware applications.

The biggest competitor to Microsoft Internet Information Server is Apache, which comes from the Apache
Foundation, a not-for-profit. Apache practically rules the Net, along with Sendmail, and Perl, both of which
also come from non-profits. Yet not-for-profit organizations have no rights at all under the proposed
settlement. It is as though they don't even exist.

Section III(J)(2) contains some very strong language against not-for-profits. Specifically, the language says
that it need not describe nor license API, Documentation, or Communications Protocols affecting authentication
and authorization to companies that don't meet Microsoft's criteria as a business:
'...(c) meets reasonable,
objective standards established by Microsoft for certifying the authenticity and viability of its business,
...'

So much for SAMBA and other Open Source projects that use Microsoft calls. The settlement gives Microsoft the
right to effectively kill these products.

Section III(D) takes this disturbing trend even further. It deals with disclosure of information regarding the
APIs for incorporating non-Microsoft "middleware." In this section, Microsoft discloses to Independent
Software Vendors (ISVs), Independent Hardware Vendors (IHVs), Internet Access Providers (IAPs), Internet
Content Providers (ICPs), and Original Equipment Manufacturers (OEMs) the information needed to inter-operate
with Windows at this level. Yet, when we look in the footnotes at the legal definitions for these outfits, we
find the definitions specify commercial concerns only.

But wait, there's more! Under this deal, the government is shut out, too. NASA, the national laboratories, the
military, the National Institute of Standards and Technology -- even the Department of Justice itself -- have
no rights. It is a good thing Afghanistan is such a low-tech adversary and that B-52s don't run Windows.

I know, I know. The government buys commercial software and uses contractors who make profits. Open Source
software is sold for profit by outfits like Red Hat. It is easy to argue that I am being a bit shrill here.
But I know the way Microsoft thinks. They probably saw this one coming months ago and have been falling all
over themselves hoping to get it through. If this language gets through, MICROSOFT WILL FIND A WAY TO TAKE
ADVANTAGE OF IT."

Other good points are raised (more succintly and in more detail than I have time to go into) at
http://www.kegel.com/remedy/remedy2.html (this list is taken from the end of the page, and is linked on the
page it came from to the relevant sections of the article)

* The PFJ doesn't take into account Windows-compatible competing operating systems
  * Microsoft increases the Applications Barrier to Entry by using restrictive license terms and intentional
incompatibilities. Yet the PFJ fails to prohibit this, and even contributes to this part of the Applications
Barrier to Entry.

* The PFJ Contains Misleading and Overly Narrow Definitions and Provisions
  * The PFJ supposedly makes Microsoft publish its secret APIs, but it defines "API" so narrowly that many
important APIs are not covered.
  * The PFJ supposedly allows users to replace Microsoft Middleware with competing middleware, but it defines
"Microsoft Middleware" so narrowly that the next version of Windows might not be covered at all.
  * The PFJ allows users to replace Microsoft Java with a competitor's product -- but Microsoft is replacing
Java with .NET. The PFJ should therefore allow users to replace Microsoft.NET with

competing middleware.
  * The PFJ supposedly applies to "Windows", but it defines that term so narrowly that it doesn't cover
Windows XP Tablet PC Edition, Windows CE, Pocket PC, or the X-Box -- operating systems that all use the Win32
API and are advertised as being "Windows Powered".
  * The PFJ fails to require advance notice of technical requirements, allowing Microsoft to bypass all
competing middleware simply by changing the requirements shortly before the deadline, and not informing ISVs.
  * The PFJ requires Microsoft to release API documentation to ISVs so they can create compatible middleware -
- but only after the deadline for the ISVs to demonstrate that their middleware is compatible.
  * The PFJ requires Microsoft to release API documentation -- but prohibits competitors from using this
documentation to help make their operating systems compatible with Windows.
  * The PFJ does not require Microsoft to release documentation about the format of Microsoft Office
documents.
  * The PFJ does not require Microsoft to list which software patents protect the Windows APIs. This leaves
Windows-compatible operating systems in an uncertain state: are they, or are they not infringing on Microsoft
software patents? This can scare away potential users.

* The PFJ Fails to Prohibit Anticompetitive License Terms currently used by Microsoft
  * Microsoft currently uses restrictive licensing terms to keep Open Source apps from running on Windows.
  * Microsoft currently uses restrictive licensing terms to keep Windows apps from running on competing
operating systems.
  * Microsoft's enterprise license agreements (used by large companies, state governments, and universities)
charge by the number of computers which could run a Microsoft operating system -- even for computers running
Linux. (Similar licenses to OEMs were once banned by the 1994 consent decree.)

* The PFJ Fails to Prohibit Intentional Incompatibilities Historically Used by Microsoft
  * Microsoft has in the past inserted intentional incompatibilities in its applications to keep them from
running on competing operating systems.

* The PFJ Fails to Prohibit Anticompetitive Practices Towards OEMs
  * The PFJ allows Microsoft to retaliate against any OEM that ships Personal Computers containing a competing
Operating System but no Microsoft operating system.
  * The PFJ allows Microsoft to discriminate against small OEMs -- including regional 'white box' OEMs which
are historically the most willing to install competing operating systems -- who ship competing software.
  * The PFJ allows Microsoft to offer discounts on Windows (MDAs) to OEMs based on criteria like sales of
Microsoft Office or Pocket PC systems. This allows Microsoft to leverage its monopoly on Intel-compatible
operating systems to increase its market share in other areas.

* The PFJ as currently written appears to lack an effective enforcement mechanism.

Most of the article at http://www.ccianet.org/papers/ms/sellout.php3 (though it may be a bit harsh) raises
some good points, as does Ralph Nader's open letter
(http://www.cptech.org/at/ms/rnjl2kollarkotellynov501.html) to Judge Kollar-Kotelly.

Brian D. Allbee